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# PEMBINAAN JAYA ZIRA SDN BHD v. SUNGAI LUI CONSTRUCTION & DEVELOPMENT SDN BHD & ANOTHER APPEAL

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COURT OF APPEAL, PUTRAJAYA
MOHD NAZLAN GHAZALI JCA
MOHD FIRUZ JAFFRIL JCA
EVROL MARIETTE PETERS JCA
[CIVIL APPEAL NOS: W-02(C)(A)-538-04-2025
& W-02(C)(A)-547-04-2025]
8 DECEMBER 2025

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**Abstract** – *An arbitral award resulting from a court-ordered reference under s. 24A of the Courts of Judicature Act 1964, is legally distinct from a consensual award under the Arbitration Act 2005 ('AA'), as it functions as an extension of the court's trial process where the arbitrator acts as a judicial delegate. Consequently, because such an award carries the inherent status of a court decree or judgment, it cannot be enforced under s. 38 of the AA, which strictly requires a written arbitration agreement that is absent in court-ordered references; this distinction grants the court significantly broader powers to supervise, vary, or set aside the award compared to the more restrictive grounds available under the AA.*

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***ARBITRATION:*** *Award – Enforcement – Dispute pertaining non-payment of fees and wrongful termination of contract – Aggrieved party initiated suit at court – Parties referred to court-ordered arbitration under s. 24A of Courts of Judicature Act 1964 – Distinction between court-ordered reference and consensual arbitration – Whether award could be enforced under s. 38 of Arbitration Act 2005*

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***CONTRACT:*** *Subcontract – Illegality – Public policy – Total subcontract of works by Bumiputera main contractor – Whether 'Ali Baba' arrangement – Whether contrary to public policy and void – Contracts Act 1950, s. 24*

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The respondent was appointed by the appellant as the subcontractor for a project which was awarded by Jabatan Kerja Raya to Pembinaan Jaya Zira Sdn Bhd JV Iscorp Sdn Bhd, a joint venture company, as the main contractor. Due to non-payment of fees and the alleged wrongful termination of the contract by the appellant, the respondent initiated a suit against the appellant at the High Court. With the consent of the parties, the High Court ordered that the claim be referred to an arbitrator, pursuant to s. 24A of the Courts of Judicature Act 1964 ('CJA'). An arbitrator was appointed and the arbitration concluded in favour of the respondent and the respondent was awarded a sum of RM13,647,485.47. At the High Court, the respondent applied to enforce the final award while the appellant applied to have the

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final award set aside. The High Court allowed the respondent's application and dismissed the appellant's application. Hence, the present appeals by the appellant. The issues that arose for adjudication were: (i) whether an award, pursuant to a reference to arbitration under s. 24A of the CJA could be enforced pursuant to s. 38 of the Arbitration Act 2005 ('AA'); and (ii) whether the subcontract from the appellant to the respondent was illegal as contrary to public policy.

**Held (allowing appeals)**
**Per Evrol Mariette Peters JCA delivering the judgment of the court:**

**(1a)** The final award was enforced under s. 38 of the AA. Section 38(1) of the AA is a procedural provision that facilitates the registration of awards arising from consensual arbitration proceedings. Under this provision, an award, unlike a court judgment or order, must first be converted into a judgment or order of the court before execution could be levied. Only upon such conversion does the arbitral award attain the status of a court judgment or order. (paras 47 & 48)

**(1b)** An arbitral award, made pursuant to s. 24A of the CJA, should be enforced under that very provision, which accorded such an award the same status as a decree, judgment or order of the court. As a s. 24AA arbitral award does not stem from a written arbitration agreement within the meaning of the AA, it could not be enforced under s. 38 of the AA, which expressly required the production of both the arbitral award and the written arbitration agreement between the parties; neither of which existed in this instance. (para 51)

**(1c)** There is a fundamental distinction between out-of-court arbitration by agreement and a reference ordered by the court. In the former, arbitration arises solely from the parties' contractual arrangement, and the court has no active role unless it intervenes externally. By contrast, a court-ordered reference is part of the trial of the entire action or specific issues within it and the arbitrator functions as the court's delegate. The proceedings before the arbitrator are thus an episode within the broader judicial process, subject to the court's supervision. As a result, the court's powers to oversee, intervene in or set aside the award are significantly broader than in voluntary arbitration. The court may set aside or vary the award if it is unsupported by evidence, contrary to the weight of the evidence or erroneous in law, reflecting the court's overarching control over the proceedings it initiated. (paras 52 & 53)

**(2)** The appellant was a Bumiputera company and the letter of award to the respondent effectively created a total subcontract. In substance, this amounted to an 'Ali Baba' arrangement, as the entire scope of works under the main contract was subcontracted to the respondent.

The respondent itself acknowledged that it had been appointed as the total subcontractor, which was distinct from an ordinary subcontractor, as it was tasked with executing 'all works, including the responsibilities under the main contract conditions for all works'. Such arrangements are contrary to public policy and, therefore, void under s. 24 of the Contracts Act 1950. (paras 55, 57, 58 & 61)

**Case(s) referred to:**

*Agasta Co Ltd & Anor v. Autopulence Sdn Bhd & Another Appeal [2025] 7 CLJ 707 CA* ***(refd)***
*Baldev Singh v. Mahima Singh & Ors [1974] CLJU 13; [1974] 1 LNS 13 HC* ***(refd)***
*Bank Simpanan Nasional v. Cyber Business Solutions Sdn Bhd; Elsag Datamat Spa (Third Party) [2010] 9 CLJ 202 HC* ***(refd)***
*Buckley & Anor v. Bennell Design & Construction Pty Ltd & Anor [1978] 19 ALR 257* ***(refd)***
*China Airlines Ltd v. Maltran Air Corp Sdn Bhd & Another Appeal [1996] 3 CLJ 163 FC* ***(refd)***
*Chow Yee Wah & Anor v. Choo Ah Pat [1978] CLJU 32; [1978] 1 LNS 32* ***(refd)***
*Ikris Bina Sdn Bhd v. Jianseng Construction Sdn Bhd [2019] CLJU 1662; [2019] 1 LNS 1662 HC* ***(refd)***
*Keng Soon Finance Bhd v. MK Retnam Holdings Sdn Bhd & Anor [1989] 1 CLJ 897; [1989] 1 CLJ (Rep) 1 PC* ***(refd)***
*Kondapuram Raghuram v. Soo Peng & Ors [2006] 5 CLJ 634 HC* ***(refd)***
*Lum Chang Building Contractors Pte Ltd v. Anderson Land Pte Ltd [2000] SGCA 18* ***(refd)***
*Merong Mahawangsa Sdn Bhd & Anor v. Dato' Shazryl Eskay Abdullah [2015] 8 CLJ 212 FC* ***(refd)***
*Multar Masngud v. Lim Kim Chet & Anor [1982] CLJ 107; [1982] CLJ (Rep) 237 FC* ***(refd)***
*Nor Azlina Abdul Aziz v. Expert Project Management Sdn Bhd [2017] 5 CLJ 58 CA* ***(refd)***
*Norman Disney & Young v. Affifi Hj Hassan [2011] 1 CLJ 210 HC* ***(refd)***
*Paya Terubong Estates Sdn Bhd v. Pusaka Warisan Sdn Bhd [1998] 2 CLJ 909 CA* ***(refd)***
*UEM Group Bhd v. Genisys Integrated Engineers Pte Ltd & Anor [2010] 9 CLJ 785 FC*
*Watt Or Thomas v. Thomas [1947] AC 487* ***(refd)***
*Woon Ngee Yew & Ors v. Ng Yoon Thai & Ors [1940] CLJU 119; [1940] 1 LNS 119 HC* ***(refd)***

**Legislation referred to:**

Arbitration Act 2005, ss. 37, 38(1), 39
Arbitration Ordinance 1950, s. 15
Contracts Act 1950, s. 24
Courts of Judicature Act 1964, s. 24A(3), (4)

Arbitration Act [Sing], s. 22
Arbitration Act 1889 [UK], ss. 13, 14
Arbitration Act 1902 [NSW], s. 15

*For the appellant - Sanjay Mohanasundram, Siew Suet Mey & Rodney Gan Pei Rong; M/s Sanjay Mohan*
*For the respondent - Irwin Lo Chi Vui & Chan Yi Zheng; M/s Lo Chambers*

*[Editor's note: For the High Court judgment, please see Sungai Lui Construction & Development Sdn Bhd v. Pembinaan Jaya Zira Sdn Bhd [2025] CLJU 1132 (overruled).]*

*Reported by Najib Tamby*

## JUDGMENT

**Evrol Mariette Peters JCA:**

### Introduction

**[1]** There were two appeals filed and heard together.

**[2]** Appeal 538 was in relation to WA-24C(ARB)-37-06-2024 ("Arb 37"), that is against the decision of the learned High Court Judge in allowing the respondent's application to enforce the arbitration award in the High Court; and Appeal 547 was in relation to the decision of the learned High Court Judge in dismissing the appellant's application to set aside the arbitration award in the High Court *via* WA-24C(ARB)-57-08-2024 ("Arb 57").

### The Factual Background

**[3]** Pursuant to a letter of award dated 18 July 2019 ("the letter of award"), the respondent was appointed by the appellant (collectively "the parties") as the total subcontractor for a particular project ("the project").

**[4]** The project was awarded by Jabatan Kerja Raya to Pembinaan Jaya Zira Sdn Bhd JV Iscorp Sdn Bhd (a joint venture company) as the main contractor, where the appellant had been given a power of attorney to carry out the project.

**[5]** Due to the non-payment of fees and the alleged wrongful termination of the contract by the appellant, in November 2020, the respondent initiated a suit against the appellant *via* WA-22C106-11-2020 at the High Court of Kuala Lumpur.

**[6]** On 26 February 2021, with the consent of the parties, the then High Court Judge ordered that the claim be referred to an arbitrator ("the arbitrator") pursuant to s. 24A of the Courts of Judicature Act 1964 ("CJA"), and on 1 March 2021, the arbitrator was duly appointed.

**[7]** The arbitration concluded in favour of the respondent and pursuant to a final award dated 31 May 2024 ("the final award"), the respondent was awarded a sum of RM13,647,485.47.

**[8]** In June 2024, the respondent filed Arb 37 pursuant to s. 38 of the Arbitration Act 2005 ("Arbitration Act") to enforce the final award, and the appellant, in August 2024, applied to have the final award set aside *via* Arb 57 pursuant to s. 37 of the Arbitration Act.

**[9]** On 18 July 2024, the respondent, through its solicitors had requested for further directions from the High Court which led to the court's directions to proceed under s. 38 of the Arbitration Act for Arb 37.

**[10]** In March 2025, the learned High Court Judge allowed Arb 37 and dismissed Arb 57 with costs. Dissatisfied, the appellant appealed against both decisions ("the appeals").

A **The Issues**

**[11]** The issues for consideration were as follows:

(i) whether the learned High Court Judge was correct in allowing the enforcement of the award pursuant to s. 38 of the Arbitration Act; and

B (ii) whether the subcontract from the appellant to the respondent was illegal as contrary to the public policy.

**[12]** The appeals were unanimously allowed for the following reasons.

**Contentions, Evaluation And Findings**

C **[13]** The starting point for an appellate court is the presumption that any decision appealed against is correct in every respect. Therefore, to succeed in this appeal, the appellant in the present case must convince this court that the decision appealed against is wrong; and if this court was not so convinced, this appeal would fail.

D **[14]** This principle expounded in *Watt Or Thomas v. Thomas* [1947] AC 487 has been assimilated into Malaysian jurisprudence through several cases including *Chow Yee Wah & Anor v. Choo Ah Pat* [1978] CLJU 32; [1978] 1 LNS 32, *UEM Group Bhd v. Genisys Integrated Engineers Pte Ltd & Anor* [2010] 9 CLJ 785, and *Ikris Bina Sdn Bhd v. Jianseng Construction Sdn Bhd* E [2019] CLJU 1662; [2019] 1 LNS 1662.

**[15]** However, this does not mean that the hands of the appellate court are tied. The exception to the general rule mentioned above is when the findings are clearly wrong: *China Airlines Ltd v. Maltran Air Corp Sdn Bhd & Another* F *Appeal* [1996] 3 CLJ 163; [1996] 2 MLJ 517; or where crucial evidence has been misconstrued, or disregarded: *Multar Masngud v. Lim Kim Chet & Anor* [1982] CLJ 107; [1982] CLJ (Rep) 237; or if the trial judge is shown to have misdirected himself on the evidence, or to have rejected evidence for a wrong reason, or to have drawn an inference from evidence which was equally capable of supporting a different inference, it then may be the duty of an G appellate court to interfere: *Woon Ngee Yew & Ors v. Ng Yoon Thai & Ors* [1940] CLJU 119; [1940] 1 LNS 119; [1941] 10 MLJ (FMSR) 37.

**[16]** I found instructive also the case of *Paya Terubong Estates Sdn Bhd v. Pusaka Warisan Sdn Bhd* [1998] 2 CLJ 909; [1998] 2 MLJ 463, where it H was stated by Gopal Sri Ram JCA (as he then was) in the following passage:

> One can, of course, quite well appreciate an appellate court's reluctance to disturb the primary exercise of discretion. This is because a court of appeal in a matter such as the present does not possess an original discretion, its initial function being one of review only. *However, where, as* I *in the present instance, it is amply demonstrated that the judge in whom the primary discretion is vested has failed to take into account relevant considerations, it is the duty of this court to say so and to intervene and set matters right by an exercise of its own discretion.* (emphasis added)

**[17]** In *Nor Azlina Abdul Aziz v. Expert Project Management Sdn Bhd* [2017] 5 CLJ 58; [2017] 3 MLJ 763, the principles of appellate intervention were distilled by the Court of Appeal, through Harmindar Singh Dhaliwal JCA (as he then was) in the following passages:

> [20] Nevertheless there are occasions when appellate interference is warranted and these occasions have been well set out in numerous cases. Some of these occasions are:
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> (a) where the trial judge took into account irrelevant considerations and failed to give due weight to relevant considerations (see *Director of Forests & Anor v. Mau Kam Tong & Mau Kim Siong (the executors of the estate of Mau Ming, deceased) & Anor and another appeal* [2010] 3 MLJ 509);
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> (b) where there was no proper evaluation of the evidence by the trial judge (see *Lee Nyan Hon & Bros Sdn Bhd v. Metro Charm Sdn Bhd* [2009] 6 MLJ 1);
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> (c) where the decision arrived at by the trial court was without judicial appreciation of the evidence (see *Gan Yook Chin (P) & Anor v. Lee Ing Chin @ Lee Teck Seng & Ors* [2005] 2 MLJ 1);
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> (d) where a trial court has so fundamentally misdirected itself, that no reasonable court which had properly directed itself and asked the correct questions, would have arrived at the same conclusion (see *Raja Lob Sharuddin bin Raja Ahmad Terzali & Ors v. Sri Seltra Sendirian Bhd* [2008] 2 MLJ 87);
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> (e) where the trial judge was plainly wrong in arriving at his decision see *Lee Ing Chin @ Lee Teck Seng v. Gan Yook Chin & Anor* [2003] 2 MLJ 97); 772 Malayan Law Journal [2017] 3 MLJ;
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> (f) where a trial judge had so manifestly failed to derive proper benefit from the undoubted advantage of seeing and hearing witnesses at the trial, and in reaching his conclusion, has not properly analysed the entirety of the evidence which was given before him (see *First Count Sdn Bhd v. Wang Yew Logging & Plantation Sdn Bhd* [2013] 4 MLJ 693 which followed the Privy Council case of *Choo Kok Beng v. Choo Kok Hoe & Ors* [1984] 2 MLJ 165); and
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> (g) where the judgment is based upon a wrong premise of fact or of law (see *Perembun (M) Sdn Bhd v. Conlay Construction Sdn Bhd* [2012] 4 MLJ 149).

**[18]** The gist of this appeal was whether the learned High Court Judge was correct in allowing the enforcement of the final award pursuant to s. 38 of the Arbitration Act, rather than s. 24A of the Courts of Judicature Act. The provisions read:

Arbitration Act 2005

Section 38 – Recognition and enforcement

(1) On an application in writing to the High Court, an award made in respect of an arbitration where the seat of arbitration is in Malaysia or an award from a foreign State shall, subject to this section and section 39 be recognised as binding and be enforced by entry as a judgment in terms of the award or by action.

(2) In an application under subsection (1) the applicant shall produce:

(a) **the duly authenticated original award** or a duly certified copy of the award; and

(b) **the original arbitration agreement** or a duly certified copy of the agreement.

(3) Where the award or arbitration agreement is in a language other than the national language or the English language, the applicant shall supply a duly certified translation of the award or agreement in the English language.

(4) For the purposes of this Act, "foreign State" means a State which is a party to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards adopted by the United Nations Conference on International Commercial Arbitration in 1958.

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Courts of Judicature Act 1964

Section 24A - Reference under order of Court

(1) The High Court **may refer any question** arising in any cause or matter, other than a criminal proceeding by the Public Prosecutor, for inquiry or report to any special referee. The report of a special referee may be adopted wholly or partially by the High Court and enforced as a decree, judgment or order to the same effect.

(2) In any cause or matter other than a criminal proceeding by the Public Prosecutor:

(a) if all the parties interested who are not under disability consent;

(b) if the cause or matter requires any prolonged examination of documents or any scientific or local investigation which cannot, in the opinion of the High Court, conveniently be conducted by the Court through its ordinary officers; or

(c) if the question in dispute consists wholly or in part of matters of account, the High Court may at any time order the whole cause or matter or any question or issue of fact arising therein to be tried before a special referee or arbitrator respectively agreed on by the parties or before an officer of the Court.

(3)(a) In all cases of reference to a special referee or arbitrator under an order of the High Court in any cause or matter, **the special referee or arbitrator shall be deemed to be an officer of the Court** and shall have such authority and shall conduct the reference in such manner as is prescribed by rules of court, and subject thereto as the High Court may direct.

(b) The report or award of any special referee or arbitrator on any such reference shall, unless set aside by the High Court, be equivalent to the decree, judgment or order of the Court.

(c) The remuneration to be paid to any special referee or arbitrator to whom any matter is referred under order of the High Court shall be determined by the Court.

(4) The High Court shall, as to references under order of the Court, have all the powers which are by the Arbitration Act 1952, conferred on the High Court as to references by consent out of Court.

(emphasis added)

**[19]** It was, therefore, pertinent, at the outset, to address the issue of whether there is a difference between the court-referred arbitration pursuant to s. 24A of the Courts of Judicature Act and the submission to arbitration by virtue of s. 38 of the Arbitration Act.

*Court-ordered Reference To Arbitration v. Submission To Arbitration*

**[20]** Section 24A of the Courts of Judicature Act was first introduced as s. 15 of the Arbitration Ordinance 1950, but was later repealed and incorporated into the Courts of Judicature Act as s. 24A. According to the official report of the 'Dewan Rakyat' (Parlimen Ketiga, Penggal Kedua, 24 May 1972, at 1402), the Parliament considered the provision to belong "more properly" in the Courts of Judicature Act than in the Arbitration Ordinance.

**[21]** Section 24A of the Courts of Judicature Act has its genesis in ss. 13 and 14 of the UK Arbitration Act 1889 which provide as follows:

Section 13 – Reference for report

(1) Subject to Rules of Court and to any right to have particular cases tried by a jury, **the court or a judge may refer any question** arising in any cause or matter) other than a criminal proceeding by the crown) for inquiry or report **to any official or special referee.**

(2) The report of an official or special referee may be adopted wholly or partially by the Court or a judge, and **if so adopted may be enforced as a judgment or order to the same effect.**

...

A Section 14 – Power to refer to certain cases

In any cause or matter (other than criminal proceedings by the Crown):

(a) If all the parties interested who are not under disability consent; or

(b) If the cause or matter requires any prolonged examination of
B documents or any scientific or local investigation which cannot in the opinion of the Court or a judge conveniently be made before a jury or conducted by the Court through its other ordinary officers; or

(c) If the question in dispute consists wholly or in part of matters of account;

C the Court or a judge may at any time order the whole cause or matter, or any question or issue of fact arising therein, to be tried before a special referee or arbitrator respectively agreed on by the parties, or before an official referee or officer of the court. (emphasis added)

**[22]** Similar provisions may be found in s. 15 of the New South Wales
D Arbitration Act 1902, which reads:

Section 15 - References under order of Court.

In any cause or matter (other than a criminal proceeding by the Crown):

(a) if all the parties interested who are not under disability consent; or

E (b) if the cause or matter requires any prolonged examination of documents or any scientific or local investigation which cannot, in the opinion of the Court or a Judge, conveniently be made before a jury or conducted by the Court through its other ordinary officers; or

F (c) if the question in dispute consists wholly or in part of matters of account;

**the Court or a Judge may at any time order the whole cause or matter or any question or issue of fact arising** therein, to be tried before an arbitrator agreed on by the parties, or **before a referee appointed by the**
G **Court or a Judge for the purpose**.

(emphasis added)

**[23]** We were, therefore, guided by the Australian decision in *Buckley & Anor v. Bennell Design & Construction Pty Ltd & Anor* [1978] 19 ALR 257 ("*Buckley*"). In that case, the parties had consented to an order referring the
H questions and matters in dispute to an arbitration before an arbitrator mutually agreed upon, pursuant to s. 15 of the New South Wales Arbitration Act 1902.

**[24]** At the High Court of Australia, the following question was posed:

I Are the principles which determine whether the court should set aside or remit an award made by an arbitrator or referee agreed on or appointed under s. 15 of the Arbitration Act 1902 as amended, the same as those

applicable in relation to an award made on a submission within s. 4 of the Act as was held by the Full Court in *Sydney & Suburban Hydraulic Power Co v. Mercantile Mutual Insurance Co* (1896) 17 LR (NSW) 323 in relation to the corresponding provisions of the Arbitration Act 1892?

**[25]** The central issue before the High Court in *Buckley* concerned whether there existed a distinction between a court-ordered reference to arbitration and a submission to arbitration arising from a written arbitration agreement voluntarily entered into by the parties.

**[26]** The High Court held that a reference under s. 15 was "in no way analogous" to an award rendered by an arbitrator appointed pursuant to a consensual arbitration agreement. The court reasoned that in a court-ordered reference, the arbitration derives its authority from the court itself rather than from the mutual consent of the parties, and accordingly, the powers and consequences flowing from such a reference differ materially from those of a purely contractual arbitration.

In such a reference the **court's procedures of adjudication are not abandoned in favour of extra-curial settlement of the dispute by arbitration.** Instead the court directs that, for the better resolution of the particular proceedings initiated before it, resort should be had to this special mode of trial which the legislation has made available.

(emphasis added)

**[27]** After examining the legislative history of the corresponding English provisions, Stephen J in *Buckley* drew a clear conceptual distinction in law between a court-ordered reference to arbitration as opposed to a submission to arbitration.

**[28]** Stephen J's view was fortified by the following academic sources:

... The learned editor of *Russell on Arbitration and Award* observed in the 10th edition (1919) at p 496, that references the subject matter of that part of the Arbitration Act 1889 appearing under the heading "*References under order of Court" were "not references to arbitration in the ordinary sense of the term and their inclusion in an Arbitration Act, or in a book on Arbitration causes confusion*". Such references, he continued, were nothing more than a delegation of the trial to an officer of the court; hence the need, where the delegate was not already such an officer, to deem him one (s. 15(1)) for that specific purpose. The sections were no more than a part of the machinery of the court for the trial of some cases or for inquiry and report as to questions arising in such cases. It was for this reason that, as stated in the 12th edition of that work, all discussion of such references was wholly omitted from that and all subsequent editions. The first edition of *Halsbury's Laws of England*, vol 1 (1907) observes the same distinction: *references pursuant to an order of the court under the Act are described as "entirely different from arbitrations held pursuant to a submission out of court" (p 483).* Mr Hogg, in his *Law of Arbitration*, notes, at p 184, that the decision of one

A to whom a matter is referred by order of the court under its statutory jurisdiction is "both in its effect and by reason of the provisions relating to appeal or review wholly different from an award in a reference by consent out of court. (emphasis added)

**[29]** From the above, it could be surmised that in Australia, an arbitral B award under court-ordered reference to arbitration is different from an arbitral award that is given as a result of parties' submission to arbitration.

**[30]** In our view, we are in agreement with *Buckley*, in that s. 24A of the Courts of Judicature Act deals with a court-ordered reference to arbitration, which must be distinguished from a submission to arbitration under the C Arbitration Act.

*Whether Award Obtained Pursuant To A Court-Ordered Reference To Arbitration May Be Enforced Under Arbitration Act*

**[31]** The subsequent and main issue was whether an award pursuant to D a reference to arbitration under s. 24A of the Courts of Judicature Act could be enforced pursuant to s. 38 of the Arbitration Act.

**[32]** The distinction between enforcing an award under s. 38 of the Arbitration Act as opposed to s. 24A of the Courts of Judicature Act lies primarily in the source of the arbitrator's authority and the nature of the E court's supervisory role.

**[33]** Since an award under s. 38 of the Arbitration Act arises from a voluntary and private submission to arbitration, the arbitrator derives his jurisdiction from a contractual agreement between the parties. In such cases, the Arbitration Act governs the entire process, and the court's intervention F is limited to narrow grounds listed in ss. 37 and 39 of the Arbitration Act, both of which read:

Section 37 – Application for setting aside

(1) An award may be set aside by the High Court only if:

G (a) the party making the application provides proof that:

(i) a party to the arbitration agreement was under any incapacity;

(ii) the arbitration agreement is not valid under the law to which H the parties have subjected it, or, failing any indication thereon, under the laws of Malaysia;

(iii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present that party's case;

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(iv) the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration;

(v) subject to subsection (3), the award contains decisions on matters beyond the scope of the submission to arbitration; or

(vi) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Act from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Act; or

(b) the High Court finds that:

(i) the subject-matter of the dispute is not capable of settlement by arbitration under the laws of Malaysia; or

(ii) the award is in conflict with the public policy of Malaysia.

(2) Without limiting the generality of subparagraph (1)(b)(ii), an award is in conflict with the public policy of Malaysia where:

(a) the making of the award was induced or affected by fraud or corruption; or

(b) a breach of the rules of natural justice occurred-

(i) during the arbitral proceedings; or

(ii) in connection with the making of the award.

(3) Where the decision on matters submitted to arbitration can be separated from those not so submitted, only that part of the award which contains decisions on matters not submitted to arbitration may be set aside.

(4) An application for setting aside may not be made after the expiry of ninety days from the date on which the party making the application had received the award or, if a request has been made under section 35, from the date on which that request had been disposed of by the arbitral tribunal.

(5) Subsection (4) does not apply to an application for setting aside on the ground that the award was induced or affected by fraud or corruption.

(6) On an application under subsection (1) the High Court may, where appropriate and so requested by a party, adjourn the proceedings for such period of time as it may determine in order to allow the arbitral tribunal an opportunity to resume the arbitral proceedings or to take such other action as in the arbitral tribunal's opinion will eliminate the grounds for setting aside.

(7) Where an application is made to set aside an award, the High Court may order that any money made payable by the award shall be brought into the High Court or otherwise secured pending the determination of the application.

...

Section 39 – Grounds for refusing recognition or enforcement

(1) Recognition or enforcement of an award, irrespective of the State in which it was made, may be refused only at the request of the party against whom it is invoked:

(a) where that party provides to the High Court proof that-

(i) a party to the arbitration agreement was under any incapacity;

(ii) the arbitration agreement is not valid under the law to which the parties have subjected it, or, failing any indication thereon, under the laws of the State where the award was made;

(iii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present that party's case;

(iv) the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration;

(v) subject to subsection (3), the award contains decisions on matters beyond the scope of the submission to arbitration;

(vi) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Act from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Act; or

(vii) the award has not yet become binding on the parties or has been set aside or suspended by a court of the country in which, or under the law of which, that award was made; or

(b) if the High Court finds that:

(i) the subject-matter of the dispute is not capable of settlement by arbitration under the laws of Malaysia; or

(ii) the award is in conflict with the public policy of Malaysia.

(2) If an application for setting aside or suspension of an award has been made to the High Court on the grounds referred to in subparagraph (1)(a)(vii), the High Court may, if it considers it proper, adjourn its decision and may also, on the application of the party claiming recognition or enforcement of the award, order the other party to provide appropriate security.

(3) Where the decision on matters submitted to arbitration can be separated from those not so submitted, only that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced.

**[34]** These grounds are consistent with the UNCITRAL Model Law, such as lack of jurisdiction, procedural irregularity, breach of natural justice, or conflict with the public policy. The court does not and cannot review the merits or correctness of the award, as the parties have chosen arbitration as a private and final means of dispute resolution.

**[35]** By contrast, an award made pursuant to a court-ordered reference to arbitration, as in *Buckley,* derives its authority from the order of reference made by the court. The arbitrator in such circumstances acts as a delegate of the court, and the award, once adopted, assumes the character of a judgment of the court itself. Accordingly, the supervisory power to set aside or vary such an award arises not under s. 37 of the Arbitration Act, but under s. 24A, in particular subs. (3), of the Courts of Judicature Act or the court's inherent jurisdiction. Section 24A(3) of the Courts of Judicature Act is emphasised below:

> Section 24A – Reference under order of Court
>
> ...
>
> (3)
>
> (a) In all cases of reference to a special referee or arbitrator under an order of the High Court in any cause or matter, *the special referee or arbitrator shall be deemed to be an officer of the Court* and shall have such authority and shall *conduct the reference in such manner as is prescribed by rules of court,* and subject thereto as the High Court may direct. (emphasis added)

**[36]** Under this framework, therefore, the court retains broader discretion to correct errors of law on the face of the award, procedural irregularities, or misconduct by the arbitrator, and may vary, remit, or set aside the award as it would any other judgment made in proceedings under its control.

**[37]** In short, s. 38 of the Arbitration Act applies to contractual arbitrations governed by the Arbitration Act, while s. 24A of the Courts of Judicature Act applies to court-ordered references, where the award forms part of the court's own process and remains subject to its supervisory and appellate jurisdiction.

**[38]** The respondent relied heavily on the case of *Lum Chang Building Contractors Pte Ltd v. Anderson Land Pte Ltd* [2000] SGCA 18 ("*Lum Chang*"), to argue that the final award made pursuant to s. 24A of the Courts of Judicature Act does not require adoption by the court before it can become effective and enforced.

**[39]** It was our view that the respondent adopted a limited reading of *Lum Chang*. In *Lum Chang*, the central issue in the appeal concerned the question of the appropriate procedure to adopt to challenge an arbitral award where the reference to arbitration was directed by the High Court pursuant to s. 22

of the Singaporean Arbitration Act, and not pursuant to a written arbitration agreement. The Singapore Court of Appeal held that whilst an award rendered pursuant to a s. 22 reference did not require adoption by the court before it can become effective, the court could, in directing a reference, order that the arbitrator submit his award to the court for adoption.

**[40]** In the present case, pursuant to para. 4 of the arbitrator's letter of appointment dated 1 March 2021, the learned High Court Judge had ordered the arbitrator to submit his award to the court for adoption. The relevant paragraph reads:

> 4. The award shall be handed to me upon publication to be made as a judgment of the Court.

**[41]** As such, it was expressly stipulated that the award given by the arbitrator is to be handed to the learned High Court Judge to be made as a judgment of the court and this is essential before the award could become effective.

**[42]** Under a court-ordered reference made pursuant to s. 24A of the Courts of Judicature Act, no separate application is required for the adoption of the arbitrator's award or the special referee's report. The reference, the inquiry, and the eventual adoption form part of a continuous judicial process within the existing suit. Once the arbitrator or referee files the report with the High Court, the court should fix a hearing and invite submissions from the parties on whether the report should be accepted, varied, rejected, or referred back.

**[43]** Section 24A(4) of the Courts of Judicature Act expressly empowers the court to adopt the report on its own motion, and adoption is effected through a formal court's order made at that post-report hearing. Accordingly, unlike the enforcement of a private arbitral award under the Arbitration Act, no fresh originating summons or separate application is necessary; an adoption occurs through the court's inherent control over its own reference.

**[44]** However, in the present case, the process contemplated under s. 24A of the Courts of Judicature Act for adopting the arbitrator's report was never undertaken.

**[45]** It was crucial to note that both *Buckley* and *Lum Chang* were referred to by the court in *Bank Simpanan Nasional v. Cyber Business Solutions Sdn Bhd; Elsag Datamat Spa (Third Party)* [2010] 9 CLJ 202, where it was stated by Hamid Sultan Abu Backer J in the following passage:

> It must be asserted that the scheme of s. 24A is such that the final decision maker is the court on the report or award and in consequence the courts role is never abdicated in respect of the decision making process. Under s. 24A **the final arbiter to say what is right and wrong is the court and in that aspect the constitutional role of court is preserved.** (emphasis added)

**[46]** Since an arbitrator appointed under s. 24A of the Courts of Judicature Act is deemed to be an officer of the court and is required to conduct the reference in accordance with the rules of court, subject to direction from the court, a s. 24A arbitral award may be set aside or appealed against, while arbitral awards made under the Arbitration Act may only be challenged under very restrictive grounds found in s. 37 of the Arbitration Act.

**[47]** In the present case, the final award was enforced under s. 38 of the Arbitration Act.

**[48]** Section 38(1) of the Arbitration Act is a procedural provision that facilitates the registration of awards arising from consensual arbitration proceedings. Its primary purpose is to enable the successful party to enforce the reliefs granted by the arbitral tribunal through execution proceedings. Under this provision, an award, unlike a court's judgment or order, must first be converted into a judgment or order of the court before execution can be levied. Only upon such conversion does the arbitral award attain the status of a court's judgment or order.

**[49]** The respondent contended that the appellant was estopped from arguing that the Arbitration Act did not apply to the enforcement of the award, as the appellant itself had invoked s. 37 of the Arbitration Act in seeking to set aside the final award.

**[50]** While it was true that the appellant had relied on s. 37 of the Arbitration Act, we were of the view that it had no real alternative but to do so, since the respondent had first invoked s. 38 of the same Act. Accordingly, the respondent's argument on estoppel was unsustainable.

**[51]** We, therefore, took the position that an arbitral award made pursuant to s. 24A of the Courts of Judicature Act should be enforced under that very provision, which accords such an award the same status as a decree, judgment, or order of the court. As a s. 24A arbitral award does not stem from a written arbitration agreement within the meaning of the Arbitration Act, it cannot be enforced under s. 38, which expressly requires the production of both (i) the arbitral award and (ii) the written arbitration agreement between the parties, neither of which exists in this instance.

**[52]** In a nutshell, it is our view that there is a fundamental distinction between an out-of-court arbitration by agreement and a reference ordered by the court. In the former, arbitration arises solely from the parties' contractual arrangement, and the court has no active role unless it intervenes externally.

**[53]** By contrast, a court-ordered reference is part of the trial of the entire action or specific issues within it, and the arbitrator functions as the court's delegate. The proceedings before the arbitrator are thus an episode within the broader judicial process, subject to the court's supervision. As a result, the court's powers to oversee, intervene in, or set aside the award are significantly broader than in voluntary arbitration. The court may set aside

A or vary the award if it is unsupported by evidence, contrary to the weight of the evidence, or erroneous in law, reflecting the court's overarching control over the proceedings it initiated.

*Whether The Subcontract From The Appellant To The Respondent Was Contrary To Public Policy*

B

**[54]** The appellant further contended that the contract was illegal as it contravened public policy, arguing that the arrangement between the appellant and the respondent was against the national economic policy as it constituted an "Ali Baba" arrangement.

C **[55]** A review of the evidence revealed that the appellant is a Bumiputera company, and that the letter of award to the respondent effectively created a total subcontract. In substance, this amounted to an "Ali Baba" arrangement, as the entire scope of works under the main contract was subcontracted to the respondent. This was clearly supported by the fact that D the appellant was registered as a G7 (Bumiputera) company, as reflected in the 'Butiran Kontrak' attached to the letter of award.

**[56]** The terms of the letter of award which stipulates, *inter alia*, as follows:

> ... We, Pembinaan Jaya Zira Sdn Bhd (hereinafter called the 'Main Contractor') or referred as the 'Contractor' in the Conditions of Contract E under the Main Contract entered into between the Government of Malaysia and Pembinaan Jaya Zira JV Iscorp Sdn Bhd (hereinafter called the 'Contractor') are pleased to inform that Sungai Lui Construction & Development (hereinafter called the 'Total Sub-Contractor') offer to **execute and complete the whole of the Main Contract Works** subject to the Conditions of Main Contract, Specifications, Drawings, *etc* ... F
>
> (emphasis added)

**[57]** In fact, the respondent itself acknowledged that it had been appointed as the total subcontractor, which is distinct from an ordinary subcontractor, as it was tasked with executing "all works, including the responsibilities under the main contract conditions for all works". G

**[58]** In our view, the arrangement plainly constituted an "Ali Baba" arrangement, and consistent with the established case law, such arrangements are contrary to public policy and therefore void.

**[59]** Reference was made to several cases regarding the "Ali Baba" H arrangement including *Kondapuram Raghuram v. Soo Peng & Ors* [2006] 5 CLJ 634; [2006] 7 MLJ 510, *Baldev Singh v. Mahima Singh & Ors* [1974] CLJU 13; [1974] 1 LNS 13, *Norman Disney & Young v. Affifi Hj Hassan* [2011] 1 CLJ 210; [2010] MLJU 543, and *Agasta Co Ltd & Anor v. Autopulence Sdn Bhd & Another Appeal* [2025] 7 CLJ 707.

I

**[60]** In *Agasta Co Ltd & Anor v. Autopulence Sdn Bhd & Another Appeal* [2025] 7 CLJ 707, it was stated:

> [51] *In our view, the object of the contractual arrangement that had been entered into by each respondent with Rintis was clearly intended to circumvent the requirements imposed under the Dasar Baharu AP Terbuka.* The avowed objectives of the MITI policy was set out in paragraph 1.1, and included the aim of fortifying the economic agenda of Bumiputeras. The scheme put in place by Rintis and the respondents exemplifies what is colloquially referred to as an Ali Baba arrangement, with the Bumiputera company acting merely as a front, and reduced to a rent-seeking role. It is difficult to see how this arrangement does not abuse and undermine the affirmative action policies of the government.
>
> [52] *We are thus of the view that the contracts entered into by each of the respondents with Rintis are void ab initio as being contrary to public policy under section 24(e) of the Contracts Act 1950.* For this reason, title to the subject MPVs never passed to the respondents, notwithstanding that they may have paid for them. (emphasis added)

**[61]** As the arrangement amounted to an "Ali Baba" scheme, we took the view that the agreement contravened public policy, particularly as it was inconsistent with the objectives of the national economic policy. Accordingly, it was void under s. 24 of the Contracts Act 1950, which provides that:

> Section 24 – What considerations and objects are lawful, and what not
>
> The consideration or object of an agreement is lawful unless
>
> (e) the court regards it as immoral or **opposed to public policy.**
>
> In each of the above cases, the consideration or object of an agreement is said to be unlawful. Every agreement of which the object or consideration is unlawful is void. (emphasis added)

**[62]** It is well established that when facts before the court indicate that an agreement may be tainted by illegality, the court is duty-bound to take notice of it *ex proprio motu*. Even if illegality had not been specifically pleaded, no court may, with knowledge, lend its aid to enforce an unlawful agreement: *Keng Soon Finance Bhd v. MK Retnam Holdings Sdn Bhd & Anor* [1989] 1 CLJ 897; [1989] 1 CLJ (Rep) 1.

**[63]** Courts are bound at all stages to take notice of illegality, whether *ex facie* or which later appears, even though not pleaded: *Merong Mahawangsa Sdn Bhd & Anor v. Dato' Shazryl Eskay Abdullah* [2015] 8 CLJ 212; [2015] 5 MLJ 619.

A **[64]** Accordingly, even if we were to agree with the High Court that the final award was correctly enforced under s. 38 of the Arbitration Act, s. 39 of the Arbitration Act would nonetheless have rendered the parties' arrangement void, as it conflicts with public policy. This further reinforced our view that the appeals should be allowed.

B **Conclusion**

**[65]** In the upshot, based on the aforesaid reasons, and after judicious consideration of all the evidence before this court, submissions of both parties, and grounds of judgment of the learned High Court Judge, we unanimously allowed the appeals with costs.

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